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No. 03-724

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,

Petitioners,

v.

EMPAGRAN, S.A., *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF EUROPEAN BANKS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI*[1]

In the decision under review, *Empagran, S.A.* v. *F. Hoffmann-La Roche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003) ("*Empagran*"), the D.C. Circuit construed the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") to authorize plaintiffs to bring suit under U.S. antitrust law to recover for injuries arising from the effects of anticompetitive conduct on purely foreign commerce, so long as the conduct that caused their injury also "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Empagran* Pet. App. 4a. In so doing, the D.C. Circuit noted its essential agreement with the position of the Second Circuit, as established in *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003) (No. 02-340). *Empagran* Pet. App. 4a.

Amici are European Banks (the "European Banks" or "*Amici*") that are defendants in an antitrust action filed within the Second Circuit seeking recovery for alleged injuries occurring entirely outside U.S. commerce. After the district court dismissed the amended complaint for lack of subject matter jurisdiction, the Second Circuit vacated and remanded, in accord with the analysis in *Kruman* and *Empagran*. See *Bank Austria AG* v. *Sniado*, 352 F.3d 73 (2d Cir. 2003) ("*Sniado*"), *vacating* 174 F. Supp. 2d 159 (S.D.N.Y. 2001). On January 12, 2004, the European Banks filed a petition seeking certiorari review of the Second Circuit's decision (U.S. No. 03-1015). The petition raises precisely the legal

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, we state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *Amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

issues also raised in *Empagran* and requests that the Court hold the case pending its decision in *Empagran*.

Accordingly, *Amici* have strong particular and general interests in this case. First, the decision in *Empagran* will likely resolve potentially dispositive legal issues directly presented in the antitrust action brought against *Amici*. Second, as entities routinely engaged in transactions in commerce entirely foreign to the United States but that are governed by the antitrust regimes of individual European states and the European Union, *Amici* have a substantial interest in the correct construction of the FTAIA and in preventing yet another layer of competition regulation from being applied to those transactions.

Finally, the antitrust action against the European Banks usefully illuminates problematic aspects of the ruling below. The facts of the action vividly illustrate the absence of U.S. interest in the transactions alleged to have caused antitrust injury, the extraordinary difficulty of litigating claims involving purely foreign transactions and injuries, and the extent to which such litigation intrudes upon extant foreign regulation and damages international relationships.

For each of these reasons, *Amici* have a significant interest in presenting their views to this Court and believe that the Court may benefit from that presentation.

SUMMARY OF ARGUMENT

The European Banks file this brief not to repeat the arguments of petitioners, which they fully endorse. Instead, the Banks urge the Court to focus on the antitrust action filed against them which illustrates the damaging consequences of the FTAIA interpretation announced by the D.C. Circuit and the Second Circuit – consequences so harmful that they undermine the ruling below.

First, in the antitrust action in which the European Banks are defendants, an individual seeks to recover for injuries that he allegedly incurred in Europe while exchanging one European currency for another at European banks. Although plaintiff alleges the boilerplate conclusion of "direct, substantial, and reasonably foreseeable" effects on United States commerce, he has alleged no facts indicating that the alleged anticompetitive activity caused any effects in the United States. Nonetheless, to obtain the benefits of the U.S. forum and substantive U.S. law, including treble damages, the plaintiff is seeking discovery in the hope that he can support his bare allegation that there is such an effect. Virtually any conduct affecting only foreign commerce might motivate a plaintiff to allege an effect on someone in U.S. commerce. The D.C. and Second Circuits' rule, accordingly, will result in an avalanche of antitrust actions in U.S. district courts alleging purely foreign injuries.

Second, *Sniado* starkly illustrates the practical difficulties resulting from the D.C. and Second Circuits' interpretation of the FTAIA. The rule will result in burdensome and complex discovery, and any computation of damages will require an evaluation of the effects of conduct on numerous foreign markets (potentially including, in *Sniado*, the markets of Austria, Belgium, Germany, Italy and the Netherlands, but not the United States). Moreover, because injury to "someone" in U.S. commerce is a prerequisite to a Sherman Act claim, the court will often be required to conduct collateral litigation concerning whether a person or entity *not before the court* has suffered a "direct, substantial, and reasonably foreseeable" injury in U.S. commerce. 15 U.S.C. § 6a. As we show *infra*, this would be a peculiar practice in American jurisprudence generally and in antitrust law specifically.

Third, *Sniado* makes plain that the D.C. and Second Circuits' rule will interfere with foreign states' competition regulation and create tension with those nations. The

European Union and its individual member states have a well-developed competition law, and have indicated that they do not welcome the expansion of U.S. competition law coverage to purely European transactions (any more than the United States would welcome the expansion of European Union competition law to purely U.S. transactions). Both the U.S. government and foreign nations have further concluded that expanding U.S. competition law to purely foreign transactions will undermine international cooperation and deterrence efforts.

The D.C. and Second Circuits' interpretation of the FTAIA is contrary to the statutory language, legislative history and purpose of the FTAIA; it also generates damaging consequences that serve no discernable purpose. The decision below should be reversed.

ARGUMENT

PLAINTIFFS MAY NOT PURSUE SHERMAN ACT CLAIMS BASED ON INJURIES SUSTAINED IN DISCRETE TRANSACTIONS OCCURRING ENTIRELY OUTSIDE U.S. COMMERCE.

In *Empagran*, the D.C. Circuit held that five foreign companies located in Australia, Ecuador, Panama and the Ukraine could pursue an antitrust action under the Sherman Act to remedy injuries resulting solely from purchases made outside the United States that had no impact on U.S. commerce. The court held that so long as "someone, even if not the foreign plaintiff who is before the court," has an injury arising from an effect of the defendant's conduct on U.S. commerce, every foreign plaintiff with a claim arising from a purely foreign effect can sue as well. *Empagran* Pet. App. 4a, 19a-20a. In addition, the court held that the foreign plaintiffs had suffered "'antitrust injury'" and therefore had standing to bring their claim, stating that the arguments that persuaded

the court to find jurisdiction over the claims of foreign plaintiffs complaining of foreign injuries "similarly persuade us that the antitrust laws [are] intended to prevent the harm that the foreign plaintiffs suffered here." *Id.* at 36a. The *Empagran* defendants conceded that "someone" in the United States had been injured by the effect of their conduct on U.S. commerce; the court therefore allowed plaintiffs' claim to proceed.

In *Sniado*, the antitrust action filed against the European Banks, the Second Circuit's decision rested on the proposition that the antitrust jurisdiction of U.S. courts extends to the claim of an individual who was allegedly injured when he exchanged one European currency for another at certain European banks in Europe, and who suffered no injury in commerce either within the United States or between the United States and any other country.[2] See *Sniado* Pet. App. 10a. Like the D.C. Circuit, the Second Circuit ruled that a plaintiff may bring an antitrust action in a U.S. court against foreign defendants to redress alleged injuries suffered abroad that arose entirely out of foreign commerce (and that were unrelated to any effect the foreign conduct might have had on U.S. commerce).

In contrast to *Empagran*, the Second Circuit remanded the case to the district court to determine the foreign plaintiff's standing to bring suit. *Sniado* Pet. App. 8a. Moreover, in

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[2] The Second Circuit erroneously stated that Mr. Sniado "exchanged American dollars for Euro-currencies." 352 F.3d at 75. Rather, Mr. Sniado exchanged "'currencies that make up the Euro.'" *Sniado* v. *Bank Austria AG*, 174 F. Supp. 2d 159, 160 (S.D.N.Y. 2001) (quoting Am. Comp. ¶ 5). The plaintiff alleged in his amended complaint filed in 2001: "Until Euro banknotes and coins are introduced in 2002, the currencies of the countries making up the Euro-zone are still exchanged when traveling from one Euro-zone country to another." Am. Comp. ¶ 37. The Euro-zone countries at the relevant time were Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. *Id.* The Second Circuit's error in this regard had no efffect on its legal conclusion.

Sniado, the European Banks vigorously disputed the allegation that the alleged conduct had any "'direct, substantial, and reasonably foreseeable'" effects in the United States; indeed, the plaintiff had sought discovery on the issue of subject matter jurisdiction. *Id.* at 13a. Thus, the Second Circuit also ordered the district court to determine on remand whether the alleged conduct had any effect on U.S. commerce.

The briefs of petitioners and their other *amici* in *Empagran* show that the legal rule propounded by the D.C. Circuit and the Second Circuit is contrary to the best reading of the statutory language, to the legislative history and purpose of the FTAIA, to effective deterrence of antitrust violations and to international comity and cooperation in antitrust enforcement. The European Banks fully endorse these arguments and will not repeat them here. Instead, *Amici* seek to use their case, *Sniado*, to demonstrate the serious deficiencies of, and harmful consequences flowing from, the rule announced in *Empagran* and *Sniado* – consequences so detrimental that they expose the error of the D.C. and Second Circuits' interpretations of the FTAIA.

First, *Sniado* illustrates the type of antitrust action that will clog the federal courts if the announced rule is upheld. Like this case, many future suits are likely to be based on alleged antitrust violations the effects of which are felt in foreign markets, and with U.S. effects that are at most tangential. Specifically, in *Sniado*, an individual, John Sniado, filed a class action under Section 1 of the Sherman Act, alleging that he paid "'supra-competitive fees'" to certain of the European Banks when exchanging one European currency for another European currency. *Sniado* Pet. App. 10a. It was conceded that Mr. Sniado's transactions occurred solely in Europe. *Id.* Mr. Sniado thus seeks to recover for alleged injuries from exchanges of *European* currencies at certain *European* banks in *Europe*. He bases his allegations on a European Union investigation into alleged conspiracies to fix the rates for

exchanging European currencies (*id.* at 2a-3a), but he has failed to allege that the European Union's investigation found any evidence that the conspiracies were intended to or did have any effects in the United States. Significantly, *Amici* are aware of no plaintiff, in *Sniado* or any other case, alleging injury resulting from the conduct at issue in *Sniado*. To gain the benefits of a U.S. forum and U.S. antitrust law, however, Mr. Sniado will look hard for such evidence: Discovery will be necessary to determine whether the alleged conspiracy in fact had a "'direct, substantial, and reasonably foreseeable effect'" on U.S. commerce. *Id.* at 6a, 13a.

The consequences of the D.C. and Second Circuits' rule for U.S. district courts are appalling and cannot be what Congress intended. The district courts will be required to adjudicate a multitude of antitrust actions filed by foreign plaintiffs based on anticompetitive conduct affecting only foreign commerce, so long as "someone" has been injured by such conduct's effect on the U.S. economy. See *Den Norske Stats Oljeselskap As* v. *HeereMac Vof* , 241 F.3d 420, 427-28 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002); U.S. *Amicus* Br. in *Empagran*, Pet. App. 79a. U.S. courts will have to police and remedy injuries in foreign markets, such as the vitamin and currency markets outside the U.S. at issue in *Empagran* and *Sniado*, despite the absence of any U.S. interest. The United States simply has no dog in such fights.

Second, *Sniado* shows that the practical realities of the above-described assumption of jurisdiction are daunting. Permitting plaintiffs whose injuries arise in foreign markets to sue under U.S. antitrust laws would significantly "burden[] the courts." *Associated Gen. Contractors of Cal., Inc.* v. *California Council of Carpenters*, 459 U.S. 519, 545 (1983) ("*AGC*"). For example, in cases involving European transactions, discovery will be particularly burdensome because the witnesses and evidence will often be located outside the United States, raising complex issues under the

Hague Evidence Convention[3] and substantial issues of international comity. District courts will also have to perform the difficult task of ascertaining whether certain defendants have a presence in the United States that is adequate to allow the courts to assert personal jurisdiction. Assessing damages will be exceptionally difficult because U.S. courts will have to evaluate economic effects on foreign markets, many of which do not have available the same empirical data found in the United States.

In *Sniado*, for example, the court potentially will have to assess the effect of the alleged price-fixing conspiracy on Euro-zone markets of Austria, Belgium, Germany, Italy and the Neatherlands, among others. Assessing the effects of antitrust violations on foreign markets will undoubtedly "require additional long and complicated proceedings involving massive evidence and complicated theories." *AGC*, 459 U.S. at 544 (internal quotation marks omitted). The litigation may involve documents in foreign languages addressing European markets or witnesses familiar only with such markets, and not U.S. markets. The sole relationship between such litigation and the United States would be the nationality of the lawyers, and the allegation that "someone" other than the plaintiff had been injured in U.S. commerce. "[M]assive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits." *Id.* at 545

The lower courts' rule also will burden the district courts with substantial collateral litigation. In *Empagran*, it was conceded that someone had been injured by the effect of the vitamin distributors' conduct on U.S. commerce. But often that will not be the case, as in *Sniado*. In fact, beyond his boilerplate allegation that petitioners' conduct caused "direct,

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[3] Convention for the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444.

substantial, and reasonably foreseeable" effects on U.S. commerce, 15 U.S.C. § 6a, Mr. Sniado alleged nothing establishing that the alleged conspiracies had any effects in the United States. Indeed, although he brought this case as a putative class action, Mr. Sniado did not and presumably was unable (despite multiple opportunities to amend his complaint) to add a named plaintiff who claimed injury by reason of currency exchanges in the United States. See *Sniado* Pet. App. 12a-14a. The European Banks, moreover, know of no U.S. actions seeking recovery for injuries suffered in U.S. commerce as a result of the alleged antitrust violations about which Mr. Sniado complains.

Thus, if the D.C. and Second Circuits' ruling stands, antitrust litigation alleging purely foreign injury will often require discovery into whether the defendants' anticompetitive conduct has caused injury to some non-party in U.S. commerce. The plaintiff will be attempting to prove, as a prerequisite to suit, not that he or she suffered a injury, but that some person not before the court has suffered a cognizable harm as the result of a "direct, substantial and reasonably foreseeable" effects of the defendant's conduct on U.S. commerce. This situation is absurd and is alien to a judicial system in which parties cannot, as a general matter, seek relief based on an injury suffered by a third party. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

The proposition is especially alien in antitrust law where there is a long established requirement that an antitrust plaintiff plead and prove an injury that is "of the type the antitrust laws were designed to prevent," *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 111-13 (1986), and that "flows from that which makes defendants' acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Like *Empagran*, *Sniado* raises the question whether purchasers who have been injured only in foreign commerce by alleged anticompetitive conduct have standing

to pursue damages for their foreign injuries in U.S. courts. See 352 F.3d at 78-79. As the petitioners in *Empagran* have pointed out, the D.C. Circuit's decision turned "the FTAIA into a silent partial repeal of the basic standing principles laid down by this Court in *Brunswick*, for the benefit of foreign plaintiffs." *Empagran* Pet. 21. This point is even more compelling where, as here, there is no conceivable impediment to the filing of lawsuits by plaintiffs whose injuries arise out of the alleged conspiracy's effect on U.S. commerce. Cf. *AGC*, 459 U.S. at 542 ("[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general").[4]

These litigation consequences militate powerfully against the lower courts' construction of the FTAIA.

Third, *Sniado* illustrates the substantial infringement on the sovereign prerogatives of foreign nations resulting from the D.C. and Second Circuits' rule. For reasons exemplified by *Sniado*, it is a deeply embedded principle in antitrust jurisprudence that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Corp.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). See also *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (U.S. statutes are not construed

[4] *Amici* agree that the *Empagran* respondents lack standing to pursue their antitrust claims; a finding that the *Empagran* respondents lack standing would entail the same result for Mr. Sniado. Even if the *Empagran* respondents somehow have standing based on different lawsuits filed by plaintiffs claiming that the same price-fixing conspiracy at issue in *Empagran* also caused injuries in U.S. commerce, that holding would not aid Mr. Sniado. He has identified no victims injured in the United States, and thus there is a substantial likelihood that his injuries result from an alleged conspiracy with effects exclusively in foreign markets.

to apply extraterritorially absent "'clearly expressed'" congressional intent), *superceded by statute on other grounds*, *Landgraf* v. *U.S.I. Film Prods.*, 511 U.S. 244 (1994); Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of [*Empagran*] Petition 7 ("F.R.G. *Amicus* Br."). Mr. Sniado's suit illustrates the absurd consequences of ignoring these principles: a U.S. court adjudicating allegations based on a European Union investigation into whether European banks agreed to fix rates for exchanging Euro-zone currencies in Euro-zone countries.

Foreign nations understandably believe that they have the right to regulate their own markets and economies according to their own laws and policies. Expansion of U.S. antitrust enforcement authority in the past has led to frictions between the United States and its allies. In fact, many foreign nations, including Canada and the United Kingdom, have enacted legislation intended to block enforcement of U.S. judgments for treble damages. See 2 ABA Section of Antitrust Law, *Antitrust Law Developments* 1208 (5th ed. 2002). By dramatically expanding the extraterritorial reach of the U.S. antitrust laws, the Second and D.C. Circuits' interpretation of the FTAIA will substitute U.S. courts for European Union regulators as arbiters of anti-competitive conduct in Europe – an outcome to which the United States would surely object if the tables were turned. This, in turn, promises to create new frictions between the United States and other countries over international antitrust policy and to impede efforts to promote cooperation in antitrust enforcement. See generally F.R.G. *Amicus* Br. 11-16.

The European Union and its Member States (among other foreign jurisdictions) have been aggressively prosecuting illegal cartels and levying large fines for violations of their own antitrust laws, in part by offering leniency to those who self-report violations. *Id.* at 14-16. If the decisions in *Empagran* and *Sniado* are upheld, cartel members determining whether to participate in foreign nations'

leniency programs will have to consider the potentially massive exposure they will face in U.S. courts for transactions having nothing to do with the United States. *Id.* at 16. Opening U.S. courthouses to claims for antitrust injuries suffered in foreign commerce not only would infringe on the sovereignty of foreign nations but also would threaten to undermine their efforts to enforce their antitrust laws by discouraging wrongdoers from participating in leniency programs. Impeding foreign nations' antitrust enforcement programs would directly harm U.S. interests because those programs play a vital role in cooperative efforts between the United States and other nations to deter and prosecute multi-national cartels and other antitrust violations. *See* Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of [*Empagran*] Petitioners 16-17.

In sum, the interference with foreign states' competition regulation that results from the D.C. and Second Circuits' interpretation of the FTAIA provides yet another reason to reject their erroneous rulings. See *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) ("when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them").

CONCLUSION

The decision in *Empagran* should be reversed and remanded to the court of appeals with instructions to affirm the judgment of dismissal.

Respectfully submitted,

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